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WILLIAMS-SONOMA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

14 KAREN SPECTOR, individually and on
15 behalf of all others similarly situated,

16 Plaintiff,

17 | v.

18 | WILLIAMS-SONOMA, INC.

Defendant.

Case No.: 4:24-cv-06617-HSG

*Assigned to the Hon. Haywood S. Gilliam,
Jr.*

**DEFENDANT WILLIAMS-SONOMA,
INC.'S MOTION TO DISMISS**

Hearing Date: December 12, 2024

Hearing Time: 2:00 p.m.

Courtroom: 2

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NOTICE OF MOTION AND MOTION

2 Please take notice that, on December 12, 2024, or as soon as thereafter may be
3 heard in Courtroom 2 of the Northern District of California, Oakland Courthouse, located
4 at 1301 Clay Street, Oakland, CA 94612, the Honorable Haywood S. Gilliam, Jr.
5 presiding, Defendant Williams-Sonoma (“Defendant”) will and hereby does, pursuant to
6 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Civil Local Rule 7-2, submit
7 this Motion to Dismiss (the “Motion”) of Plaintiff Karen Spector’s (“Plaintiff”)
8 Complaint.¹

Defendant seeks an order dismissing Plaintiff's Complaint in its entirety.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

12 This case is part of a “recent wave” of putative class actions brought by the same
13 law firm throughout the country under the Arizona Telephone, Utility, and Communication
14 Service Records Act (the “Arizona Records Act”), Ariz. Rev. Stat. Ann. § 44-1376 *et seq.*.
15 *See Hartley v. Urban Outfitters, Inc.*, -- F. Supp. 3d --, 2024 WL 3445004, at *4 (E.D. Pa.
16 July 17, 2024).² The Arizona Records Act was enacted to prevent pretexting, i.e., the
17 criminal act of obtaining confidential telephone records and personal information under
18 false pretenses.

21 ¹ Defendant reserves its right to move to compel arbitration. Defendant recently learned
22 that Plaintiff is one of Defendant's loyalty members and, therefore, may have agreed to an
23 arbitration provision. Defendant sought an extension of its deadline to respond to the
Complaint upon receiving this information, but did not hear back from Plaintiff's counsel,
thus necessitating the filing of this Motion in order to respond to the Complaint timely.

24 ² Additionally, Defendant’s counsel is aware of several recent cases in this circuit alleging
25 very similar claims under the Arizona Records Act. *See Carbajal v. Home Depot U.S.A., Inc.*, Case No. 2:24-cv-00730-DGC (D. Ariz.); *Carbajal v. Gap Inc.*, Case No. 2:24-cv-01056-ROS (D. Ariz.); *Dominguez v. Lowe’s Cos., Inc.*, Case No. 2:24-cv-01030-DLR (D. Ariz.); *Knight v. Patagonia, Inc.*, Case No. 2024CUBT030800 (Cal., Ventura Cnty. Sup. Ct.); *D’Hedouville v. H&M Fashion USA, Inc.*, Case No. C20243386 (Ariz., Pima Cnty. Sup. Ct.); *see also McGee v. Nordstrom, Inc.*, Case No. 2:23-cv-01875 (W.D. Wash.); *Campos v. TJX Companies, Inc.*, Case No. 1:24-cv-11067 (D. Mass.).

1 Plaintiff, on behalf of a putative class, asserts that Defendant violated the Arizona
 2 Records Act by sending promotional emails to Plaintiff and tracking certain consumer
 3 information via pixels embedded in the emails. Until this recent wave of cases, the
 4 Arizona Records Act, enacted in 2006 and amended once in 2007, had never been
 5 contorted to cover industry-standard tracking of promotional emails.

6 Plaintiff fails to demonstrate any injury as a result of Defendant's alleged tracking
 7 of consumer information via its promotional emails. The only courts to entertain claims
 8 similar to Plaintiff's here have found them insufficient under the Arizona Records Act.

9 *See Hartley*, 2024 WL 3445004; Request for Judicial Notice ("RJN"), Ex. B
 10 ("*D'Hedouville*") at 3–4 ("[N]o Arizona court has interpreted" the Arizona Records Act to
 11 apply to "information gleaned from a tracking pixel.").

12 Even if she had, Plaintiff also fails to state a claim under the Arizona Records Act, a
 13 statute which was not envisioned to empower the cause of action Plaintiff brings.

14 **II. BACKGROUND**

15 Plaintiff filed the Complaint on August 22, 2024. Dkt. 1., Ex. A ("Compl."). The
 16 Complaint asserts one count of violation of the Arizona Records Act relating to pixels
 17 Plaintiff alleges Defendant embedded into promotional emails it sends to customers and
 18 others who sign up to receive such. *Id.* ¶¶ 3–4.

19 Plaintiff alleges Defendant conveys such promotional emails "to track its recipients'"
 20 reading habits" in order to "build customer profiles so it can sell and market more products
 21 to them." *Id.* ¶ 2. According to Plaintiff, Defendant "embeds hidden spy pixel trackers
 22 within its email," which "capture and log sensitive information including the time and
 23 place subscribers open and read their messages, how long it takes the subscriber to read the
 24 email, subscribers' location, subscribers' email client type, subscribers' IP address,
 25 subscribers' device information and whether and to whom the email was forwarded to."
 26 *Id.* ¶ 4. According to Plaintiff, Defendant utilizes pixels through a software platform from
 27 Nexxen International Ltd. ("Nexxen"). *Id.* ¶ 43. Therefore, Plaintiff alleges, Defendant is

1 “sharing its user data with Nexxen.” *Id.* ¶ 45. Plaintiff further alleges Defendant did not
 2 receive the recipients’ consent to collect this information. *Id.* ¶ 4.

3 Plaintiff claims she has opened and reviewed promotional emails from Defendant
 4 for the past two years. *Id.* ¶ 7. She seeks to represent a class of “[a]ll persons within
 5 Arizona who have opened a marketing email containing a tracking pixel from Defendant.”
 6 *Id.* ¶ 46. Plaintiff alleges that Defendant’s conduct “invaded Plaintiff’s and Class
 7 members’ sensitive reading habits, including when they opened and read an email. This
 8 clandestine collection of their confidential email records also intruded upon their
 9 seclusion.” *Id.* ¶ 63.

10 **III. ARGUMENT**

11 The Court should dismiss this action for two reasons: (ii) first, Plaintiff lacks
 12 standing to bring this action; and (ii) next, Plaintiff fails to state a claim under the Arizona
 13 Records Act.

14 **A. Plaintiff Lacks Standing to Bring This Action**

15 Plaintiff lacks Article III standing to bring this action, and the Court, therefore,
 16 lacks subject matter jurisdiction over this matter. Federal courts are courts of “limited
 17 jurisdiction” and the law presumes that “a cause lies outside of this limited jurisdiction.”
 18 *Kokken v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Subject matter
 19 jurisdiction is both a statutory requirement and an Article III requirement. *Insurance*
 20 *Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 546 U.S. 694, 701–02 (1982).
 21 Article III limits the jurisdiction of federal courts to actual cases or controversies.
 22 *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). A determination that the court
 23 lacks subject matter jurisdiction requires dismissal. *See* Fed. R. Civ. P. 12(h)(3). Here,
 24 Plaintiff lacks Article III standing because she has not alleged a concrete harm, and,
 25 therefore, the Court does not have subject matter jurisdiction over Plaintiff’s claims and
 26 dismissal is required.

27 A defendant may challenge a plaintiff’s standing by a motion to dismiss pursuant to
 28 Federal Rule of Civil Procedure 12(b)(1) on the grounds of lack of subject matter

1 jurisdiction because “the issue of standing is jurisdictional.” *Steel Co. v. Citizens for a*
 2 *Better Environment*, 523 U.S. 83, 102 (1998). When subject matter is challenged under
 3 Rule 12(b)(1), the plaintiff bears the burden of proving that jurisdiction exists.
 4 *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). When the court is presented
 5 with a challenge to its subject matter jurisdiction, “no presumptive truthfulness attaches to
 6 a plaintiff’s allegations.” *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (cleaned
 7 up). In addressing this issue, the court is not limited to the Complaint, but may consider
 8 outside evidence and resolve factual issues that go to the issue of the court’s subject matter
 9 jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

10 To have Article III standing, a plaintiff must demonstrate: (1) she has suffered
 11 “injury in fact—an invasion of a legally protected interest which is … concrete and
 12 particularized”; (2) “a causal connection between the injury and the conduct complained
 13 of”; and (3) the likelihood “the injury will be redressed by a favorable decision.” *Lujan v.*
 14 *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations
 15 omitted). These requirements do not change in a class action—the named plaintiff must
 16 establish Article III standing. *Bates v. United Parcel Servs., Inc.*, 511 F.3d 974, 985 (9th
 17 Cir. 2007). Injury in fact is “the ‘[f]irst and foremost’ of standing’s three elements.”
 18 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Steel Co. v. Citizens for Better*
 19 *Environment*, 523 U.S. 83, 103 (1989)). To establish this element, “a plaintiff must allege
 20 ‘an invasion of a legally protected privacy interest’” that is concrete—meaning it “must
 21 actually exist”—as well as particularized—meaning it “must affect the plaintiff in a
 22 personal and individual way.” *Id.* (quoting *Lujan*, 504 U.S. at 560). Moreover, the harm
 23 alleged must be “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at
 24 560. “Abstract injury is not enough.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101
 25 (1983).

26 **1. Plaintiff Fails to Demonstrate a Concrete Harm**

27 Plaintiff’s claims arise out of Defendant’s alleged use of pixels that identify when
 28 emails were opened and read. The Arizona Records Act makes it unlawful for a person to

1 “[k]nowingly procure … [a] communication service record” of any Arizona resident
 2 “without the authorization of the customer[.]” *Id.* § 44-1376.01. The statute defines
 3 “communication service record” as including “subscriber information,” like a person’s
 4 “name, … electronic account identification and associated screen names … or access
 5 logs,” as well as “records of the path of an electronic communication between the point of
 6 origin and the point of delivery and the nature of the communication service provided,
 7 such as … electronic mail … or other service features.” *Id.* § 44-1376(1).

8 To satisfy the concrete harm requirement, a plaintiff must “identif[y] a close
 9 historical or common-law analogue for their asserted injury.” *TransUnion*, 594 U.S. at
 10 423. The injury Plaintiff is alleged to have suffered must be the same that a “traditional
 11 cause[] of action” seeks to prevent. *Id.* (citation and internal quotation marks omitted).

12 The Complaint is devoid of any articulable theory of harm suffered by Plaintiff,
 13 with the exception of one conclusory paragraph asserting Defendant “invaded Plaintiff’s
 14 and Class members’ right to privacy by its invasive surveillance of Plaintiff’s and Class
 15 members’ sensitive reading habits,” which allegedly “also intruded upon their seclusion.”
 16 Compl. ¶ 63. There are no allegations of any “concrete” injury sustained by Plaintiff as a
 17 result of the alleged invasion of privacy.

18 **2. *Each Court to Address this Issue Has Found No Concrete Harm.***

19 As stated above, while the Arizona Records Act was enacted in 2006 and amended
 20 once in 2007, claims similar to those Plaintiff alleges here are a recent phenomenon. Yet,
 21 both of the courts to analyze the substance of the plaintiff’s claims in these cases have
 22 found that the plaintiff lacked standing.

23 **a. *Hartley***

24 The Eastern District of Pennsylvania court in *Hartley* recently determined that the
 25 plaintiff’s claims, brought by the same firm representing the Plaintiff in this case, and
 26 identical to the claims asserted here, did not sufficiently allege a concrete harm. *Hartley*,

27

28

1 2024 WL 3445004, at *7.³ First, the court determined that Plaintiff's claim under the
 2 Arizona Records Act did not demonstrate an invasion of privacy. *Id.* at *4. In so doing,
 3 the court noted: (1) the Arizona Records Act "has never been invoked in a civil action of
 4 this nature"; (2) the Telephone Records and Privacy Protection Act of 2006, the federal
 5 counterpart to the Arizona Records Act, "is narrower in scope, plainly does not cover
 6 Defendant's alleged conduct, and therefore is of limited help"; (3) the plaintiff did not
 7 allege any disclosure of any information to third parties, thus distinguishing claims for
 8 appropriation of name or likeness, publicity given to private life, or false light; and (4)
 9 Supreme Court and Third Circuit authority "caution against finding a concrete harm when
 10 there is no actual dissemination, even if that information is protected by statute." *Id.* at
 11 *4–5.

12 All of these bases for distinguishing a common law claim for invasion of privacy
 13 are also present here. Here, Plaintiff alleges Defendant "is sharing its user data with
 14 Nexxen" because Nexxen operates the software platform through which Defendant
 15 operates pixels on its promotional emails. Compl. ¶¶ 43–45. To the extent Plaintiff will
 16 argue that Nexxen's provision of software amounts to disclosure to a third party, such an
 17 argument is misplaced. Plaintiff, appearing to quote Nexxen's publicly-available website,⁴
 18 states Nexxen "help[s] maximize [Defendant's] operational efficiency and minimize data
 19 leakage[.]" *Id.* ¶ 45. Using this questionable premise, Plaintiff then concludes that
 20 Defendant must be disclosing user information to Nexxen. *See id.* But Plaintiff fails to
 21 state how or through what mechanism Defendant provides user information to Nexxen.
 22

23 ³ After the district court dismissed the Complaint in *Hartley*, the plaintiff re-filed in the
 24 Court of Common Please, Philadelphia County, Pennsylvania. The state court dismissed
 25 the Complaint with prejudice, finding that it "must agree with Defendant's well reasoned
 26 arguments that the allegations of injuries in the underlying complaint do not sufficiently
 27 allege the requisite concrete, particularized and actual or imminent injury to confer
 28 standing in Pennsylvania courts." RJD, Ex. A (*Hartley II*) at 1 n.1.

29 ⁴ The link included in footnote 57 of the Complaint is no longer operational. Defendant,
 30 therefore, assumes based on context that Plaintiff is quoting directly from Nexxen's
 31 website.

1 Even if she did, to the extent Nexxen has access to user information by virtue of
 2 Defendant utilizing its service to communicate with those users, Nexxen would be acting
 3 as Defendant's agent, and, therefore, a party to the communication (and not a "third
 4 party"). Anything to the contrary would have wide-reaching ramifications—every single
 5 website operator utilizing software developed by another entity to communicate with users
 6 would be found to be disclosing that information to a third party.

7 The Complaint here is devoid of any concrete allegations that Defendant disclosed
 8 Plaintiff's information to any other third party. *See generally* Compl. As the *Hartley* court
 9 noted, the Supreme Court in *TransUnion* "differentiated between class members whose
 10 misleading credit files were disseminated to third parties and those class members whose
 11 files were inaccurate but maintained only internally by the credit reporting agency."
 12 *Hartley*, 2024 WL 3445004, at *5 (citing *TransUnion*, 594 U.S. at 432–34). The Supreme
 13 Court held that individuals whose files were not disclosed could not have suffered any
 14 concrete harm and rejected arguments that the potential for dissemination was sufficient to
 15 confer standing. *TransUnion*, 594 U.S. at 434.

16 The *Hartley* court also relied on *Kamal v. J. Crew Group, Inc.*, 918 F.3d 102, 113
 17 (3d Cir. 2019), wherein the Third Circuit held that plaintiff's allegations that the defendant
 18 printed on sales receipts the first five and last four digits of plaintiff's credit card number,
 19 in violation of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which
 20 prohibits the printing of more than the last five digits, did not allege a concrete injury,
 21 because plaintiff failed to allege disclosure to a third party. The Ninth Circuit has held
 22 similarly, finding a plaintiff did not allege a concrete injury under Article III in a case
 23 alleging a violation of FACTA based on the inclusion of credit card expiration dates on
 24 receipts. *See Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776, 778 (9th Cir. 2018). In
 25 *Bassett*, the Ninth Circuit determined the plaintiff's alleged injury of "exposure ... to
 26 identity theft and credit/debit fraud" and "imminent risk" that his "property would be
 27 stolen and/or misused by identity thieves" was insufficient to confer Article III standing.
 28 *Id.*

1 Next, the *Hartley* court determined the plaintiff's claim under the Arizona Records
2 Act was unlike common law intrusion upon seclusion. *See* 2024 WL 3445004, at *5–6.
3 “One who intentionally intrudes … upon the solitude or seclusion of another of his private
4 affairs or concerns, is subject to liability to the other for invasion of his privacy, if the
5 intrusion would be highly offensive to a reasonable person.” Restatement (Second) of
6 Torts § 652B. In finding that the challenged conduct would not be offensive to a
7 reasonable person, the court emphasized that the plaintiff “opted in to receiving emails
8 from Defendant by joining its subscriber list” and “continued to consume its promotional
9 materials by regularly opening them.” 2024 WL 3445004, at *6. “As a willing
10 subscriber, Plaintiff could not have been harmed by Defendant's procurement of her name
11 or associated email addresses—details she necessarily provided to Defendant when she
12 signed up for its promotional emails.” *Id.* Further, “[a]s a matter of law, … digital records
13 reflecting merely the dates and times at which Plaintiff opened promotional emails she
14 signed up to receive, and the length of time she spent reading them, are not sufficiently
15 personal to support a concrete injury.” *Id.* at *7.

16 Similarly, here, Plaintiff does not allege that she did not affirmatively sign up to
17 receive Defendant’s promotional emails. In fact, she concedes she has frequently opened
18 Defendant’s promotional emails within the past two years, most recently within the last six
19 months. Compl. ¶ 7. Nor does Plaintiff allege that she never agreed to Defendant’s
20 privacy policy (such as through purchase or membership in Defendant’s loyalty program),
21 which specifically empowers Defendant to collect the types of information challenged in
22 the Complaint.

b. *D'Hedouville*

24 More recently, and following *Hartley*, the Arizona Superior Court in *D'Hedouville*
25 found that a plaintiff alleging substantially similar claims to the Plaintiff here failed to
26 allege “a distinct and palpable injury and thus does not have standing.” *D'Hedouville* at 4.

27 The court, considering the plaintiff's allegation that the defendant "intruded into
28 Plaintiff's and Class Members' private affairs and revealed their private information,

1 including when, how, and how many times they accessed emails and their general location
 2 at the time the emails were accessed,” also found the allegation analogous to intrusion
 3 upon seclusion. *Id.* Yet, the court determined, “[w]hile Plaintiff characterizes this
 4 information as ‘intimate details,’ the above categories of information gleaned from the
 5 tracking pixel are not of the type that would be highly offensive to a reasonable person if
 6 intruded upon.” *Id.*

7 The court also determined that, “as a willing subscriber,” the plaintiff “could not
 8 have been harmed by Defendant’s procurement of his name or associated email address,”
 9 and the “other types of information are not of the kind to which a party has a reasonable
 10 expectation of privacy.” *Id.* In particular, the “sharing of an IP address is a routine event
 11 when browsing on the internet, and third-party cookies generally collect data about when
 12 and how a person interacts with a website.” *Id.* (citing *Hartley*, 2024 WL 3445004).

13 Finally, the court rejected the plaintiff’s argument that the referenced information
 14 can provide companies with consumer insights as “speculative.” *Id.* at 5. While the court
 15 acknowledged that some injuries may be elevated to a cognizable injury by statute, it
 16 ultimately held that, because the information allegedly collected was not the sort protected
 17 by the Arizona Records Act, and was not otherwise “sufficiently distinct and palpable,” the
 18 plaintiff lacked standing. *Id.*

19 **c. Summary**

20 The Court should follow the reasoning of the above-cited authorities and hold that
 21 Plaintiff has failed to establish a concrete injury. While the Complaint contains a
 22 conclusory statement that Defendant invaded Plaintiff’s privacy and intruded upon her
 23 seclusion by noting when she opened and read emails from them (Compl. ¶ 63), Plaintiff
 24 fails to identify any private, sensitive, or confidential information procured by Defendant.
 25 Plaintiff does not allege, for example, that Defendant collected “highly sensitive categories
 26 of personal information,” like “complete credit card information, medical history, or social
 27 security number.” *See Hartley*, 2024 WL 3445004, at *6. Nor does she allege how data
 28 collected concerning when someone opens and reads an email or certain information about

1 the reader can reveal private information. There are no allegations that Defendant
 2 collected Plaintiff's private or personal information or that such information was publicly
 3 disclosed or sold. Without such specifics, Defendant's mere collection of information
 4 indicating when Plaintiff opened and read an email she signed up to receive does not
 5 convey private information or constitute the sort of highly objectionable conduct needed to
 6 state a claim for invasion of privacy or intrusion upon seclusion.

7 **B. Plaintiff Fails to State a Claim Under the Arizona Records Act**

8 The Complaint should also be dismissed because Plaintiff fails to state a cognizable
 9 claim under the Arizona Records Act. A motion to dismiss pursuant to Rule 12(b)(6) tests
 10 the legal sufficiency of claims asserted in a complaint. A claim should be dismissed where
 11 there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts
 12 alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.3d
 13 696, 699 (9th Cir. 1988). A plaintiff must do more than allege "labels and conclusions,
 14 and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic
 15 Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must allege sufficient facts "to
 16 raise a right to relief above a speculative level." *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S.
 17 662, 678 (2009). Accordingly, "[t]o survive a motion to dismiss, a complaint must plead
 18 sufficient factual matter, accepted as true to allow the court to draw the reasonable
 19 inference that the defendant is liable for the misconduct alleged." *City of Dearborn
 20 Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 65 F. Supp. 3d 840, 849 (N.D.
 21 Cal. 2014) (cleaned up).

22 ***1. The Arizona Records Act Regulates Records of a Telephone or
 23 Other Communications Service Provider Providing A Platform—It
 24 Does Not Regulate Parties to a Communication.***

25 The Arizona Legislature enacted the Arizona Records Act to "[p]rohibit the
 26 unauthorized sale of telephone records." Arizona House Bill Summ., 2006 Reg. Sess. H.B.
 27 2785 (Feb. 15, 2006). Representative Jonathan Paton, the sponsor of the bill, "explained
 28 that this bill has come about due to the proliferation of internet sites which sell [telephone]

1 records.” *Id*; *see also* Arizona Fact Sheet, 2006 Reg. Sess. H.B. 2785 (Mar. 27, 2006)
 2 (discussing the FCC’s investigation into “unauthorized procurement and sale of phone
 3 records). The Legislature adopted the Arizona Records Act to combat such illicit sales and
 4 direct “telecommunications carriers maintaining telephone records to establish reasonable
 5 procedures to protect the consumer against such unauthorized or fraudulent disclosure.”
 6 Arizona House Bill Summary, 2006 Reg. Sess. H.B. 2785 (Feb. 16, 2006).

7 In its original form, the statute prohibited a person from: a) “knowingly procuring,
 8 attempting to procure, soliciting or conspiring with another to procure a telephone record
 9 ... by fraudulent, deceptive or false means”; b) “knowingly selling or attempting to sell the
 10 telephone record ... without authorization”; and c) “receiving a telephone record ...
 11 knowing that the record has been obtained without the authorization of the customer to
 12 whom the record pertains or by fraudulent, deceptive or false means.” 2006 Arizona
 13 Legis. Serv. Ch. 260 (H.B. 2785) § 44-1376.01(A)(1)–(3). The statute also “require[d]
 14 telephone companies that maintained [] telephone records ... to establish reasonable
 15 procedures to protect against unauthorized or fraudulent disclosure of telephone records[.]”
 16 *Id.* § 1376.01(B). The statute further defined “telephone record” as information retained
 17 by telephone companies relating to “the telephone number dialed by the customer or the
 18 incoming number of the call directed to a customer or other data related to such calls
 19 typically contained on a customer telephone bill.” *Id.* § 44-1376(4). A “telephone
 20 company” was defined as any person providing commercial telephone services to a
 21 customer. *Id.*

22 The Legislature amended the statute in 2007 to additionally ban procurement,
 23 selling, and receiving of “public utility” and “communication service” records. AZ H.R.
 24 B. Summ., 2007 Reg. Ses. H.B. 2726 (Mar. 2, 2007). The Arizona Records Act defines
 25 “communication service record” to include:

26 subscriber information, including name, billing or installation address, length
 27 of service, payment method, telephone number, electronic account
 28 identification and associated screen names, toll bills or access logs, records
 of the path of an electronic communication between the point of origin and
 the point of delivery and the nature of the communications service provided,

1 such as caller identification, automatic number identification, voice mail,
 2 electronic mail, paging, or other service features.

3 A.R.S. § 44-1376(1). The statute also states that the definition does not include “the
 4 content of any stored, oral, wire or electronic communication or a telephone record.” *Id.*
 5 As before, the purpose of the amendment was to prevent the procurement and sale of
 6 confidential personal information under false pretenses. *See* Arizona Senate Fact Sheet,
 7 2007 Reg. Sess. H.B. 2726 (Mar. 12, 2007). The Arizona Legislature has not further
 8 amended the statute since 2007.

9 This statutory language and history are clear that the subject of the Arizona Records
 10 Act are records of communications maintained by a service providing the communications
 11 platform. There is nothing in the language of the statute or its history demonstrating that it
 12 does or was intended to apply to information known to a party to a communication. The
 13 only court thus far to analyze the legislative history of the Arizona Records Act has held
 14 exactly so:

15 The Arizona Records Act was first enacted in 2006 to respond
 16 to concerns that additional security was needed to prevent
 17 unauthorized disclosure of information that was held by
 18 telecommunication carriers, not direct email marketing ... This
 19 initial focus on telephone records was expanded to include
 20 “communication service records” and “public utility records.”
 21 It again showed a concern that confidential information
 22 regarding a subscriber to a communication service might be
 23 procured by fraudulent or deceptive means. The Arizona
 24 legislature has not amended the statute since 2007, and no
 25 Arizona court has interpreted “communication service record”
 26 to include the information gleaned from a tracking pixel.

27 *D'Hedouville* at 3–4. All Plaintiff alleges here is that Defendant is a party to an email
 28 communication. There is no allegation that Defendant is the provider of any
 communications platform, such as Plaintiff’s email or internet service provider. All that is
 alleged is that Defendant was a party to email communications that Plaintiff implicitly
 requested.

27 In *D'Hedouville*, the court, analyzing claims materially identical to those present
 28 here, found that the defendant was not a “communication service provider” within the

1 meaning of the Arizona Act. *D'Houdeville* at 3. While the court recognized that a
 2 communication service provider is not defined in the Arizona Records Act, it noted that
 3 “another Arizona statute, the Eavesdropping and Communications Act, provides that a
 4 communication service provider means ‘any person who is engaging in providing a service
 5 that allows its users to send or receive oral, wire or electronic communications or computer
 6 services.’” *Id.* at 2 (citing A.R.S. § 13-3001(3)). “That Act defines communication service
 7 records with the exact same language as in [the Arizona Records Act].” *Id.* Utilizing this
 8 definition, the court determined that the conduct at issue, the “sending of marketing emails
 9 and collecting information from the tracking pixel,” does turn the defendant into a
 10 communication provider, because the defendant “is not engaged in providing a service that
 11 allow its users to send or receive communications.” *Id.* at 3. Nor is Defendant here.

12 Additionally, the information Plaintiff alleges Defendant collects facially does not
 13 fall within the statutory definition of a “communication service record.”⁵ Plaintiff claims
 14 pixels “capture and log sensitive information including the time and place subscribers open
 15 and read their messages, how long the subscribers read the email, subscribers’ location,
 16 subscribers’ email client type, subscribers’ IP address, subscribers’ device information and
 17 whether and to whom the email was forwarded to.” Compl. ¶ 4. None of the information
 18 Plaintiff claims Defendant collects can be fairly considered any of the statutorily-
 19 enumerated examples of a communication service record. *See* A.R.S. § 44-1376(1).

20 The Arizona Legislature has not amended the statute since 2007. If the Legislature
 21 intended the statute to apply to this type of conduct, they would have made that clear—the
 22 court should not infer such legislative intent. *See United States v. Bahe*, 201 F.3d 1124,
 23 1132 (9th Cir. 2000) (“Absent any mention in a statute’s legislative history that Congress

24
 25 ⁵ Any ambiguities in the Arizona Records Act must be interpreted in Defendant’s favor.
 26 The Act is a criminal statute—violation is a class 1 misdemeanor offense. A.R.S. § 44-
 27 1376.05. When a “penal statute[is] susceptible to different interpretations,” the rule of
 28 lenity requires courts to “resolve all doubts in the defendant’s favor.” *State v. Barnett*, 101
 P.3d 646, 649 (Ariz. Ct. App. 2004) (citation omitted); *see also Leocal v. Ashcroft*, 543
 U.S. 1, 12 n.8 (2004) (When a penal statute has “both criminal and noncriminal
 applications,” “the rule of lenity applies” to both.).

1 intended a change, courts ordinarily will refuse to find that ambiguous statutory language
 2 significantly alters an existing statutory scheme.”) (quoting *In re Century Cleaning*
 3 *Services, Inc.*, 195 F.3d 1053, 1060 (9th Cir. 1999)); *see also Hartley II* at 1 n.1 (the
 4 Arizona Records Act “does not encompass the alleged activity”).

5 Additionally, the Arizona Records Act’s legislative history makes clear that the
 6 statute is directed at preventing the sale of a log of calls by the user of a telephone system
 7 or similar communications platform. However, Defendant provides no communications
 8 platform. Rather, it is a party to communications with Plaintiff, whether that be a
 9 promotional email sent to her, or her clicking on a link and visiting Defendant’s website.
 10 Indeed, the conduct of which Plaintiff complains is more akin to a party to a call keeping a
 11 record of whether the call was answered (the opening of the email) and/or whether the
 12 other party called them back (clicking on a link in the email). Plaintiff does not allege
 13 Defendant’s collection of any consumer communication to which Defendant is not a party.
 14 Stated differently, Defendant here is not a third party service provider allegedly selling the
 15 communications records of Plaintiff to a willing buyer. Here, the records at issue relate to
 16 Defendant’s own interactions with Plaintiff as a party to the communications. Defendant,
 17 just like anyone sending an email using Outlook’s “read receipt” feature, is entitled to keep
 18 a record of when a recipient opens its emails or when that recipient voluntarily
 19 communicates with it via clicking on a link and visiting its website. Under Plaintiff’s
 20 interpretation, Party A could be held liable under the Arizona Records Act simply for
 21 telling a third party that she called Party B earlier in the day and that Party B answered the
 22 call. Such a reading is clearly beyond the scope of the statute.

23 Plaintiff’s attempts to portray Defendant’s alleged conduct as having some insidious
 24 quality are unavailing. An IP address is simply a number that internet service providers
 25 assign to devices connected to the internet so that they can communicate with each other.
 26 An individual cannot visit a website, i.e. click on a link in an email bringing them to a
 27 webpage, without disclosing the user’s IP address, because that is a necessary component
 28 of the communication of two devices. Plaintiff alleges that Defendant embeds links in its

1 promotional emails to subscribers that take them to pages on Defendant's website and
2 Defendant can identify that the site visitor was the recipient of the email. Compl. ¶¶ 56–
3 57. But Plaintiff fails to describe how this function occurs.⁶ Not only does this bald
4 conclusory accusation not meet the requirements of *Twombly* and *Iqbal* (see fn 7, *infra*),
5 stripped of adjectives this is no different than receiving somebody's phone number,
6 receiving a call from that number, and reaching the reasonable assumption that the person
7 who is calling you is the one who provided the number.⁷

2. Plaintiff Has Not Alleged That She Is a Customer As Required By The Arizona Records Act.

10 The Complaint is also deficient insofar as Plaintiff fails to allege adequately that she
11 is a “customer.” The Arizona Records Act affords relief in a civil suit only to “a *customer*
12 whose communication service records ... were procured, sold or received in violation of
13 this article.” A.R.S. § 44-1376.04(A) (emphasis added). Further, a violation of the
14 Arizona Records Act requires that the defendant procure communication service records
15 “without the authorization of the *customer* to whom the record pertains.” *Id.* § 44-
16 1376.01(A)(1) (emphasis added). The Complaint does not allege that Plaintiff was
17 Defendant’s “customer,” or that Plaintiff ever made a purchase from Defendant (including

20 ⁶ In reality, the links in such an email open a page with a customized URL for that specific
21 email, e.g., if it is a link to a “New Arrivals” page it is not the exact same URL as the
22 standard “New Arrivals” page, though the content is identical. By doing this, absent some
 strange or unforeseen circumstance, the only visitor to that URL would be the subscriber
 who received the email with that customized link.

23 ⁷ To the extent Plaintiff alleges Defendant collects some information that is beyond the
24 scope of what is normal and necessary for everyday Internet use, the Complaint fails to
25 allege sufficient detail to state this claim. *See Twombly*, 550 U.S. at 555. Plaintiff cannot
26 simply state the broad capabilities of pixels to collect certain confidential information and
27 infer Defendant’s malfeasance. To the extent Plaintiff argues Defendant intentionally
28 placed pixels to collect certain confidential information, such as “email forwarding data,”
her claims do not allege adequately this scheme. *See Hartley*, 2024 3445004, at *7
([A]llegations of what a technology is merely capable of collecting do not equate to
sufficient allegations of what that technology actually collected.”).

1 the date and method of such purchase). Plaintiff, therefore, fails to meet the criteria set
2 forth in section 44-1376.06(A).

3 For the reasons set forth above, Plaintiff fails to state a claim under the Arizona
4 Records Act.

5 | IV. CONCLUSION

6 For the foregoing reasons, Defendant respectfully requests the Court grant this
7 Motion and dismiss Plaintiff's Complaint.

9 Dated: October 28, 2024 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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